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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GARY L. WHEELOCK, Plaintiff, v. UNITED STATES OF AMERICA, et al., Defendants.	Case No. 07 cv 2177-JM(JMA) **ANSWER TO COMPLAINT**

COMES NOW Defendant United States of America, by and through its attorneys, Karen P. Hewitt, United States Attorney, and Thomas B. Reeve, Jr., and in answer to Plaintiff's complaint states as follows:

1. Answering Paragraph 1 of the Complaint, Defendant affirmatively alleges that said paragraph contains allegations which present legal conclusions and questions of law to be determined solely by the court, to which no answer is required. To the extent an answer is required, each, all and every allegation contained in said paragraph is denied.

2. Answering Paragraph 2 of the Complaint, Defendant admits that the United States of America has a Department of Veterans Affairs Medical Center in San Diego, California. Except as specifically admitted, Defendant denies, generally and specifically, each, all and every remaining allegation in said paragraph.

3. Answering Paragraph 3 of the Complaint, Defendant admits that the United States of America has a Department of Veterans Affairs Medical Center in San Diego,

California. Except as specifically admitted, Defendant denies, generally and specifically, each, all and every remaining allegation in said paragraph.

4. Answering Paragraph 4 of the Complaint, Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, and based thereon, denies generally and specifically each, all and every allegation contained therein.

5. Answering Paragraph 5 of the Complaint, Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, and based thereon, denies generally and specifically each, all and every allegation contained therein.

6. Answering Paragraph 6 of the Complaint, Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, and based thereon, denies generally and specifically each, all and every allegation contained therein.

7. Answering Paragraph 7 of the Complaint, Defendant affirmatively alleges that said paragraph contains allegations which present legal conclusions and questions of law to be determined solely by the court, to which no answer is required. To the extent an answer is required, each, all and every allegation contained in said paragraph is denied.

8. Answering Paragraph 8 of the Complaint, Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, and based thereon, denies generally and specifically each, all and every allegation contained therein.

9. Answering Paragraph 9 of the Complaint, Defendant admits that some persons working at the San Diego Veterans Affairs Medical Center are federal employees. However, there are also others, including independent contractors at the San Diego V.A. Medical Center. Except as specifically admitted, Defendant denies, generally and specifically, each, all and every remaining allegation in said paragraph.

10. Answering Paragraph 10 of the Complaint, Defendant admits that some persons working at the San Diego Veterans Affairs Medical Center are federal employees. However, there are also others, including independent contractors at the San Diego V.A. Medical Center. Except as specifically admitted, Defendant denies, generally and specifically, each, all and every remaining allegation in said paragraph.

11. Answering Paragraph 11 of the Complaint, Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, and based thereon, denies generally and specifically each, all and every allegation contained therein.

12. Answering Paragraph 12 of the Complaint, Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, and based thereon, denies generally and specifically each, all and every allegation contained therein.

13. Answering Paragraph 13 of the Complaint, Defendant admits that the Department of Veterans Affairs has a Medical Center in San Diego. Except as specifically admitted, defendant denies, generally and specifically, each, all and every remaining allegation in said paragraph.

14. Answering Paragraph 14 of the Complaint, Defendant admits that some persons working at the San Diego Veterans Affairs Medical Center are federal employees. However, there are also others, including independent contractors at the San Diego V.A. Medical Center. Except as specifically admitted, Defendant denies, generally and specifically, each, all and every remaining allegation in said paragraph.

15. Answering Paragraph 15 of the Complaint, Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, and based thereon, denies generally and specifically each, all and every allegation contained therein.

16. Answering Paragraph 16 of the Complaint, Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations therein

contained, and based thereon, denies generally and specifically each, all and every allegation contained therein.

17. Answering Paragraph 17 of the Complaint, Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, and based thereon, denies generally and specifically each, all and every allegation contained therein.

18. Answering Paragraph 18 of the Complaint, Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, and based thereon, denies generally and specifically each, all and every allegation contained therein.

19. Answering Paragraph 19 of the Complaint, Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, and based thereon, denies generally and specifically each, all and every allegation contained therein.

AFFIRMATIVE AND OTHER DEFENSES

1. The United States has not waived sovereign immunity and there is no subject matter jurisdiction under the Federal Tort Claims Act for the torts of an independent contractor. 28 U.S.C. §§ 1346(b) and 2679(b)(1).

2. The Defendant and its personnel exercised due care and diligence in accordance with the standard of care in the community with reference to the treatment of the Plaintiff, and no negligent act or failure to act by the Defendant or its agents or employees was the actual cause or proximate cause of the injuries or damage alleged in the Complaint or otherwise.

3. Occurrences prior and/or subsequent to the medical treatment performed by Defendant's employees caused, compounded or created the injuries and medical condition with reference to the Plaintiff, for which pre-existing, intervening, and superseding occurrences the United States is not liable.

4. The Plaintiff is limited to recovery, if any, of the amount claimed administratively in accordance with 28 U.S.C. § 2675(b).

5. Any damages which Plaintiff may have sustained were proximately caused solely by the independent, intervening, and superseding acts and omissions of a third person, or were caused jointly by the negligence of Plaintiff and by the independent, intervening and superseding acts or omissions of a third person.

6. Plaintiff's action is time barred by the applicable statue of limitations.

7. The injuries and damages alleged by Plaintiff were not proximately caused by a negligent or wrongful act or omission on the part of an employee or agent of the United States.

8. The Federal Tort Claims Act provides no remedy against the United States for the conduct of anyone not a federal employee.

9. Defendant United States cannot be held strictly liable under the FTCA. Plaintiff must prove negligence by a federal employee.

10. Defendant is entitled to an offset against damages, if any, for all monies paid to plaintiff by the United States as a result of Plaintiff's injuries.

11. All future damages, if any, must be reduced to present value.

12. Income taxes must be deducted from all alleged past and future lost earnings, if any.

13. Defendant asserts as an affirmative defense all of the provisions of the California Medical Injury Compensation Reform Act (MICRA), including but not limited to California Civil Code §§ 3333.1, 3333.2; California Code of Civil Procedure § 667.7; and California Business and Professions Code § 6146.

14. In the event Defendant is found liable, which defendant expressly denies, all future damages, if any, in excess of $50,000 must be paid in periodic payments.

15. Proposition 51, California Civil Code § 1431.2, et seq. provides that "each defendant shall be liable only for the amount of non-economic damages allocated to the defendant in direct proportion to that defendant's percentage of fault. . . ." It further provides for apportionment of non-economic damages at the trial level.

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16. Under MICRA, any periodic payment award must be effected through the creation of a Reversionary Trust with any unused balance reverting to the United States.

WHEREFORE, Defendant prays that Plaintiff take nothing by reason of his suit herein, that judgment be rendered in favor of said Defendant, for costs of suit herein incurred, and for such other and further relief as this Court may deem proper.

February 1, 2008

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

/s/ *Thomas B. Reeve, Jr.*

THOMAS B. REEVE, JR.
Assistant U.S. Attorney
Attorneys for Defendant
United States of America